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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001971-MR

CHRISTOPHER J. MCGORMAN, JR. — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 01-CR -00110

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER, JUDGES.

CLAYTON, JUDGE: This is an appeal from the denial of the Appellant, Christopher McGorman's motion, brought pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Based upon the following, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND INFORMATION

McGorman was convicted in the Madison Circuit Court (due to the trial court granting a change of venue) on charges of Murder, Burglary I and Defacing a Firearm. He was sentenced to life, ten years and twelve months for the crimes to run consecutively. McGorman was fourteen years old when he committed the crimes, but was tried as an adult under the Youthful Offender Act. After his conviction, he filed a direct appeal. The Supreme Court of Kentucky affirmed his conviction.

McGorman then filed an RCr 11.42 motion asserting:

> 1) That counsel was ineffective prior to trial by allowing or encouraging an interrogation of his fourteen year old client by detectives;
>
> 2) That his confession was a result of coercion;
>
> 3) That trial defense counsel should have recognized potential coercive elements of the confession and should have sought suppression;
>
> 4) That an actual or apparent conflict of interest within the office of attorney Alex Rowady limited counsel's ability to properly and fully represent the interests of the defendant;
>
> 5) That the presumption of prejudice standard to be used in determining whether counsel was ineffective;
>
> 6) That trial counsel failed to preserve the issue of Dr. Shraberg's lack of credentials and improper testing methods for appeal when he failed to seek a *Daubert* hearing or to examine documents in advance;

7) Trial defense counsel failed to protect the record regarding crucial evidence lost due to lack of fact witness, David Lee Clark, at trial;

8) Counsel was ineffective in failing to object to the introduction of unduly prejudicial evidence that had little or no probative value regarding the charges at hand;

9) That counsel was ineffective both at the trial and the appellate level due to his failure to protect the record concerning prejudicial comments by the prosecutor in closing arguments tending to scare the jury on a personal level;

10) That he was entitled to a new sentencing hearing pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(e) and (f) in light of the *Roper v. Simmons* case;

11) That the Movant's statements when interrogated by the police without the consent of his parents were not a knowing and voluntary waiver of his rights due to his age (fourteen years);

12) Under *Humphrey v. Commonwealth*, the Clark Juvenile Court did not properly transfer jurisdiction of this case to the Circuit Court because the defendant did not give a knowing voluntary waiver of his right to a preliminary hearing necessary for transfer of jurisdiction; and

13) The court should have ordered a mistrial and a new competency evaluation or trial attorney Andrew Stephens should have sought a mistrial and a competency evaluation instead of agreeing to have the defendant unable to participate in his own defense by watching the guilt/innocence phase of the trial in a back room.

The trial court examined the issues and held that some could be dealt with based on the record, while others required an evidentiary hearing. Thus, it denied several of the issues McGorman set forth and held an evidentiary hearing on the

remaining. After the hearing, the trial court denied McGorman's remaining issues and he then brought this appeal.

STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Courts must also examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Id.* at 688.

Pursuant to the holding in *Strickland, supra,* a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. With this standard in mind, we will examine the trial court's decision.

DISCUSSION

McGorman first asserts that Rowady was ineffective in failing to convey to him the offer of a twenty-year sentence and plea agreement. At the evidentiary hearing, Rowady testified that he believed he discussed the plea agreement with McGorman and knew that he had discussed it with McGorman's

parents. McGorman and his parents, however, signed affidavits stating that they had not been approached with this offer. The trial court set forth that it was denying McGorman's request for relief on this issue.

In determining whether counsel is ineffective during plea negotiations, the question is:

> whether a defendant would or would not have insisted on going to trial is relevant in the context of one who had entered into a plea arrangement as well as one who had declined the offer. The bottom line remains what risks were attendant to trial versus the benefits to be gained vis-à-vis a plea bargain, and counsel's conduct with respect to communicating these factors to the defendant.

Osborne v. Commonwealth, 992 S.W.2d 860, 864 (Ky. App. 1998). In other words, the *Osborne* Court asked "is it reasonably probable that, but for counsel's erroneous representation, [the defendant] would have pled guilty?" *Id.* at 865. McGorman received a life sentence and asserts that due to his counsel's failure to convey the plea offer to him, he should have his sentence vacated and the twenty-year sentence instituted. Alternatively, McGorman asks this court to remand the action to the trial court for an evidentiary hearing on this issue.

We agree that McGorman should have had an evidentiary hearing on this matter. While Rowady contends that he did convey the offer to McGorman's parents, they assert that he did not. Rowady tends to indicate that he cannot remember with certainty that he conveyed it to McGorman.

McGorman's next contention is that his convictions and sentence must be vacated because the Juvenile Transfer Proceedings in his case did not

comply with the rules and requirements set forth in the Kentucky Juvenile Code (KJC). Specifically, McGorman asserts that the entry of an order by the Clark Juvenile Court transferring him to the Clark Circuit Court for trial as a youthful offender after a putative waiver under Kentucky Revised Statutes (KRS) 635.020(4) was a violation of the KJC.

McGorman argues that the KJC makes clear that a waiver of rights is individual to the juvenile and may only be waived by him, not his counsel. McGorman points to KRS 600.010(2) which provides that:

> KRS Chapters 600 to 645 shall be interpreted to effectuate the following express legislative purposes:
>
> > (g) It shall . . . be the policy of this Commonwealth to provide judicial procedures in which rights and interests of all parties, including the parents and victims, are recognized and all parties are assured prompt and fair hearings. Unless otherwise provided, such protections belong to the child individually and may not be waived by any other party.

He also cites to the preamble and subsection (e) of KRS 610.060(1) which provides that:

> If the Circuit or District Court determines that a formal proceeding is required in the interest of the child . . . the court shall, when the child is brought before the court:
>
> (e) Advise the child that these rights belong to him and may not be waived by his parents, guardian, or person exercising custodial control.

McGorman contends that not even a juvenile's lawyer may waive these rights for him. The trial court held that McGorman had not "demonstrated how the

result of [his] case would have been different had . . . Rowady not stipulated to probable cause and proceeded forward with the preliminary hearing." It also held that all of the requirements set forth in the statutes "were present and known by all parties." The trial court continued:

> There was ample evidence available for the Commonwealth to establish probable cause to believe that the defendant had committed a felony. It was obvious that a firearm was used in the probable commission of that felony. The murder weapon was located in the defendant's bedroom closet. Subsequent lab tests revealed that the bullet extracted from the victim's head was positively identified as having been fired from the gun found in the defendant's closet. The defendant was fourteen years old at the time of the commission of the crime. Furthermore, the defendant's confession corroborated all of these necessary requirements for transfer.
>
> Had a preliminary hearing been conducted, it is likely that the detectives that worked the case would have testified as to all of the above. The Court finds that the District Court would have found probable cause even if a preliminary hearing had been held. The result would have been no different. The defendant is unable to show that he suffered any prejudice or inequity as a result of his attorney stipulating to probable cause.

Order entered July 14, 2009, at 22-23.

In *Humphrey v. Commonwealth*, 153 S.W.3d 854, 856-859 (Ky. App. 2004), a panel of our Court held that a juvenile could waive his right to a preliminary hearing under KRS 635.020. In *Humphrey*, the juvenile was interviewed by the juvenile court regarding his waiver and the juvenile actually signed the waiver. After this, jurisdiction was transferred. On appeal, the court held that the written waiver signed by the juvenile was not sufficient.

The Commonwealth argues that the case of *Schooley v. Commonwealth*, 556 S.W.2d 912 (Ky. App. 1977) is more on point. In *Schooley*, the Court held that when a transfer is challenged through an RCr 11.42 motion, it is to be treated differently than if it were raised through direct appeal. In the case of an RCr 11.42 motion, "[t]he error must be of such magnitude as to render the judgment of conviction so fundamentally unfair that the defendant can be said to have been denied due process of law." *Id.* at 917. The court went on to hold:

> [t]he interest of the public in the finality of criminal judgments of long standing weighs heavily in the determination when the error is relatively minor. When the trial court has general subject matter jurisdiction, an erroneous finding of the existence of a jurisdictional fact necessary to the court's jurisdiction in the particular case does not necessarily render the judgment subject to collateral attack. (Citation omitted.)

The court held that "[w]hen the issue of the validity of a transfer order is raised on direct appeal, there is a practical possibility that the juvenile defendant can still receive the benefit of an adjudication in juvenile court. No such possibility exists in this case." *Schooley* at 917-918.

Like the defendant in *Schooley*, McGorman is no longer under the juvenile system. Thus, we agree with the Commonwealth that his motion must fail on this issue based on the holding in *Schooley*.

McGorman's next argument is that he was denied effective assistance of counsel and due process when the trial court failed to hold, and trial counsel failed to request, a competency hearing when he decompensated during the trial and had

to be removed from the proceedings. At the beginning of his trial, McGorman began rocking back and forth and became upset in the courtroom. He contends that his counsel was ineffective in failing to ask for a mistrial or to ask for a contemporaneous competency evaluation. McGorman was removed from the courtroom and watched his trial on a monitor in the back. He was given larger doses of medication so he could control himself during the proceedings.

The trial court denied McGorman's motion on this issue, finding that there had been a competency hearing prior to trial and that he had been found competent. McGorman's trial counsel, Andrew Stephens, asserted that he was not being helped with his defense by McGorman. He contends that given Stephens's testimony, the acknowledgment by the prosecutor of the behavior in his closing argument, and the trial court's knowledge of his behavior, it was likely he was not competent to stand trial.

KRS 504.100 (1) provides that if, "during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition." McGorman argues that this required the trial court to have him evaluated again.

Stephens contended that it was a trial tactic and that he continued with the trial because his actions supported an insanity defense. The trial court found this reasonable and found that competency was not an issue. It did not have an evidentiary hearing on this issue. However, the trial court did fully review it. In

denying McGorman's motion on this issue, the trial court found that three doctors had testified for him. One, Dr. Granacher, testified that the rocking McGorman was exhibiting in the courtroom was a side effect of the anti-psychotic medication he was taking and his anxiety. A second doctor, Dr. Gallaher, testified that the four medications McGorman was taking could have attributed to the movement, but that it could also be due to stress since it was a common behavior for him. Dr. Buchholz stated that it was possibly medication side effects. There is sufficient evidence that the trial court examined McGorman's behavior and found that there was nothing to indicate he was not competent. Thus, we affirm the trial court's decision on this issue.

Next, McGorman argues that he was denied effective assistance of counsel and due process when trial counsel had him removed from his trial without waiving his presence. He asserts that as a criminal defendant, he had a right to be present during each critical stage of the proceedings. *See Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 107-108, 54 S. Ct. 330, 78 L. Ed. 674 (1934) and *Carver v. Commonwealth*, 256 S.W.2d 375, 377 (Ky. 1953). Kentucky courts have also held, however, that this right may be waived by the defendant's counsel or by his actions. *Scott v. Commonwealth*, 616 S.W.2d 39, 44 (Ky. 1981); *Fugate v. Commonwealth*, 62 S.W.3d 15, 18-19 (Ky. 2001). Given the actions exhibited by McGorman during trial and his counsel's waiver, the trial court correctly denied McGorman's motion on this issue.

McGorman next contends that the trial court erred in denying several of his claims without an evidentiary hearing. In *Fraser*, 59 S.W.3d at 452, the Court held that "[a] hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." In *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993), the Court held that "[i]f the answer raises a material issue of fact that cannot be determined on the face of the record[,]" an evidentiary hearing must be conducted. RCr 11.42(5). We have determined that one such issue was denied improperly. The remaining issues, however, did not require an evidentiary hearing.

McGorman next asserts that he was denied effective assistance of counsel when his trial counsel failed to object to Dr. Shraberg's testimony or to request a *Daubert* hearing regarding his credentials and testing methods. McGorman bases this argument on the Kentucky Supreme Court's review of his direct appeal. He cites the following:

> Appellant argues that the Commonwealth's expert witness, Dr. Shraberg, was not qualified to render an opinion that Appellant was criminally responsible for the crimes because he administered only the SIRS[1] test, which was not valid for children under the age of eighteen. Further, the appellant alleges that it was error for Dr. Shraberg's wife (a school psychologist) to have administered the test to Appellant. The appellant also suggests that he was unaware of Dr. Shraberg's qualifications until trial, yet he concedes that the Commonwealth furnished him with timely notice of the expert's report. The Commonwealth responds that this alleged error is not preserved and we agree.

[1] SIRS was a test administered to determine if the defendant was malingering a mental illness.

> Appellant refers in his brief to defense counsel's request to voir dire the witness regarding his qualifications and testing procedures, but he does not cite to anywhere in the record this colloquy occurred. His only reference to the record is the cross-examination of Dr. Shraberg regarding the validity of his testing procedures. The proper place for such a challenge however, is during a pre-trial "*Daubert* hearing," where the trial judge initially determines if the witness's opinion is based on scientifically valid principles and methodology, thereby rendering the opinion relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S. Ct 2786, 125 L. Ed. 2d 469 (1993); *see also Sand Hill Energy, Inc. v. Ford Motor Co., Ky*., 83 S.W.3d 483, 489 (2002). It is unclear to us if this expert was challenged at a pre-trial *Daubert* hearing. Accordingly, Appellant has not indicated to this Court how this issue is preserved for review, and we will not search the record on appeal to make that determination. CR 76.12(4)(c)(iv); *Robbins v. Robbins,* Ky. App., 849 S.W.2d 571 (1993).

McGorman v. Commonwealth, 2003 WL 21258361(Ky.)(2001-SC-0783-MR) (2001-CR-00110) at 2-3. Based upon the above holding, McGorman contends that his trial counsel did not follow the proper, standard procedure for challenging Dr. Shraberg's opinion that he was criminally responsible for his crimes. He argues that Dr. Shraberg's testimony was critical to the Commonwealth's case against him and his counsel's failure to move for a *Daubert* hearing was unreasonable.

In denying McGorman's motion on this issue, the trial court held as follows:

> A review of the record reveals that the jury was able to hear all of the above testimony relating to the SIRS test. Defense counsel challenged the propriety of administering SIRS under the circumstances presented. Further, defense counsel attacked Dr. Shraberg's administering of this one test as being insufficient in relation to the multitude of psychological tests

> administered by other doctors that revealed mental illness. The jury heard the qualifications and credentials of both doctors, and was able to hear testimony from these controverting experts as to their testing methods. The jury was entitled to place whatever weight it desired on the testimony elicited from the respective witnesses.
>
> The Court finds that no error occurred by counsel with respect to this claim. Further, the defendant has failed to demonstrate that had counsel filed a pretrial *Daubert* motion, the result would have been any different. Dr. Shraberg testified as a mental health expert, and it appears to the Court that he was qualified to render an expert opinion based upon his education and experience. (Trial Tape, Day 3, approx. 9:40). It is doubtful that *Daubert* would have precluded Dr. Shraberg from testifying at trial, even if the judge decided to rule out the SIRS test.

Order entered July 14, 2009, at 14-15. We agree with the finding of the trial court.

In making its finding that a *Daubert* hearing would have preserved the error for review, the Kentucky Supreme Court did not find there was anything wrong with the opinion given by Dr. Shraberg. The trial court, in its review of the RCr 11.42 motion, found that the opinion given by Dr. Sharberg was based upon his experience and expertise. We agree with this finding. Thus, we affirm the trial court's denial of McGorman's motion on this issue.

McGorman next contends that he was denied effective assistance of counsel when his trial counsel failed to object to the improper admission of Christopher McGorman, Sr.'s guns, which were irrelevant to the crimes charged. McGorman asserts that the introduction of not only the murder weapon, but other guns belonging to his father served only to paint him in a negative light to the jury. He

argues that the Commonwealth had the alleged murder weapon in its possession and did not need to present other weapons to the jury.

McGorman asserts that, pursuant to Kentucky Rules of Evidence (KRE) 403, trial counsel should have objected that the probative value of the weapons was outweighed by the prejudicial effect and they were, therefore, not admissible evidence. The trial court held as follows:

> As to the introduction of the guns, when viewed in context, the seven guns were introduced as part of the entirety of the evidence collected specifically from the defendant's bedroom. The seven guns were introduced, along with a loaded .38 caliber revolver found on the nightstand next to the defendant's bed, an inert grenade, military field manuals, violent video games, and numerous books, magazines, and other literature referring to firearms, machine guns, ammunition, knives, violent video games, etc. The Court finds that these exhibits were introduced collectively to establish the culture in which the defendant was living at the time, as well as his interest in and access to such items.
>
> The Court finds that the defendant was not prejudiced by the introduction of the guns. Later testimony revealed that many of those guns belonged to the defendant's father, and none of them were used during the commission of the crimes at issue. Further testimony established that the gun cabinet had been moved into the defendant's bedroom just prior to the shooting because a spare guest room, where the gun cabinet was normally located, was under renovation. Lastly, the jury heard testimony that the defendant did not have a key to the gun cabinet, and had to ask his parents for the key to gain access. The introduction of the seven guns was inconsequential when considering the totality of the evidence introduced at trial. The defendant has not met his burden of showing that there is a reasonable probability that the result of the proceeding

> would have been different, but for defense counsel's failure to object to the introduction of the guns.

In *Major v. Commonwealth*, 177 S.W.3d 700, 710 (Ky. 2005), the Kentucky Supreme Court held that "weapons, which have no relation to the crime, are inadmissible." The Court concluded that it was error to introduce other weapons. *Major* was decided after McGorman's trial. Given the testimony regarding who the guns belonged to which was given during the trial, there was no error in the introduction of the guns which would rise to the level of the *Strickland* standard. Thus, we affirm the trial court on this issue, as well.

McGorman's argument is that he was denied effective assistance of counsel when his trial counsel failed to object to the improper statements in the prosecutor's closing arguments. Specifically, McGorman points to the prosecutor's statements that the doctors who testified stated that he was getting better and asked the jury if that scared them. He went on to say that the doctors would decide when McGorman was released. During deliberations, the jury sent a question to the trial court asking what the different sentences were for guilty, but mentally ill and guilty, but insane. They also asked if McGorman would receive mental help if he were to be found guilty.

In denying McGorman relief on this issue, the trial court held as follows:

> [T]hese statements did not prejudice the defendant. It appears the statements were made to illustrate that under the insanity instruction, the treating doctors had the authority to determine the extent, and more importantly, the duration of any treatment, and therefore, if found not guilty by reason of insanity, the defendant would not

> necessarily be hospitalized on a permanent basis, nor would the treatment necessarily have to occur in a hospital setting.

Order entered July 14, 2009, at 19. The Commonwealth's argument is simply that there is no meritorious claim and that it should be upheld.

McGorman contends that the statements rose to the level of prosecutorial misconduct. In order to be entitled to relief based upon such misconduct, a defendant must show that it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974). In reviewing such misconduct in a post conviction relief motion for ineffective assistance of counsel, we must follow the *Strickland* standard and grant relief only if there is a reasonable probability that the end result would have been different but for counsel's actions. We have determined counsel's objections to the prosecutor's closing remarks would not have changed the outcome of the trial.

Finally, McGorman asserts that he was denied effective assistance of counsel when his counsel advised him to confess to the police without having him evaluated by a mental health professional and before speaking to a prosecutor about the interview. The trial court found that this was a defense strategy that McGorman's counsel used, that it was reasonable and that McGorman had not established a reasonable probability that the result of the case would have been different had this not occurred. Thus, it denied McGorman's motion on this issue.

McGorman argues that the trial court was erroneous and argues that his counsel during this stage of the proceedings, Rowady, had an obligation to conduct an investigation before advising his client to do anything. *Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009). He contends that strategic choices "made after less than complete investigation will not pass muster as an excuse when a full investigation would have revealed a large body of mitigating evidence." *Dickerson v. Bagley,* 453 F.3d 690, 696 (Ohio 2006).

McGorman called Professor William H. Fortune of the University of Kentucky College of Law to testify regarding the giving of statements by the defendant prior to a plea negotiation. Fortune testified that Rowady should have fully investigated the case, approached the prosecutor and have gotten something in writing regarding a plea agreement prior to the statement being made.

McGorman argues that his counsel was clearly ineffective in assisting him in this manner. The Commonwealth asserts that Rowady sought to show that another teenager, DC, was the "mastermind" in the plan to murder the victim. He stated that he believed a statement to the police would convince them of this fact and help mitigate the consequences to McGorman.

Both Dr. Buchholz and Dr. Granacher indicated that McGorman was suffering from mental illness at the time of the confession. Rowady had not had McGorman evaluated by a mental health professional prior to allowing him to be interviewed by the police. Rowady had not contacted the prosecutor's office to arrange any type of agreement upon allowing his client to be interviewed.

As set forth above, Rowady contends that this was trial strategy. We fail to see, however, how it could be. The circuit court found:

> . . . Rowdy's decision to advise or encourage the defendant to give his confession was a defense strategy; a tactical decision made in his client's best interest given the defendant's circumstances at the time, and did not amount to ineffective assistance of counsel under the *Strickand* standard. . . . The [c]ourt is not convinced that the defendant has established that there is a reasonable probability the result of the proceeding in this case would have been any different, but for . . . Rowady's decision to advise or encourage the defendant to make the confession at issue.

Opinion entered August 17, 2010, at 3.

"An accused's right to be represented by counsel is a fundamental component of our criminal justice system." *U.S. v. Cronic*, 466 U.S. 648, 653, 104 S. Ct. 2039, 2043, 80 L. Ed. 2d 657 (1984). "[T]he right to be represented by counsel is by far the most pervasive for it affects [the defendant's] ability to assert any other rights he may have." *Id.* at 654, 104 S. Ct. 2044. Having "the right to counsel is the right to the **effective** assistance of counsel." *Id.* (emphasis added)(quoting *McMann v. Richardson,* 397 U.S. 759, 771, n.14, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970)). An accused is entitled to the services of an attorney whose advice is "within the range of competence demanded of attorneys in criminal cases." *McMann,* 397 U.S. at 771.

In this action, Rowady was appointed shortly after the murder at issue took place. Rather than investigating the incident, having his client evaluated and speaking with a prosecutor about the possibility of a police interview, Rowady

allowed McGorman to be interviewed by the police. As stated earlier, Rowady asserted this was trial strategy.

In *Miller v. Francis,* 269 F.3d 609, 615-16 (6th Cir. 2001), the 6th Circuit Court of Appeals held that:

> A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness. *Hughes[v. United States,* 258 F.3d 453, 457 (6th Cir. 2001)]. Despite the strong presumption that defense counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable. *See Strickland,* 466 U.S. at 681, 104 S. Ct. at 2061.

In this case, it does not seem "reasonable" trial strategy to allow a juvenile to be interviewed by the police and confess when defense counsel has not had the juvenile evaluated by a mental health professional nor spoken to a prosecutor about the effect of the statement. "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic,* 466 U.S. at 658. McGorman's trial was tainted by his interrogation from the very beginning. Mental health professionals testified that McGorman was suffering from mental illness at the time of the murder and during the police interrogation. His counsel's failure to conduct an investigation, have him evaluated, and talk to a prosecutor prior to his surrender to the police for an interrogation clearly affected his ability to receive a fair trial. As

such, McGorman did not receive effective assistance of counsel as guaranteed by the Sixth Amendment.

CONCLUSION

Based upon the foregoing, McGorman's interview with the police under these particular circumstances permeated his trial with obvious unfairness and, therefore, he received ineffective assistance of counsel. Consequently, we must reverse this decision and remand this case for a new trial.

ACREE, CHIEF JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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